IN THE
INDIANA SUPREME COURT

CASE NO._____

IRA C. RITTER and THE KROGER CO.,	)	Indiana Court of Appeals
	)	No. 49A02-9912-CV-00883
Appellants (Defendants below),	)	
	)	Appeal from the
v.	)	Marion Superior Court, No.10
	)	No. 49D10-9506-CT-0959
JERRY STANTON and RUTH A. STANTON,	)	
	)	Honorable Richard H. Huston,
Appellees (Plaintiffs below).	)	Judge

BRIEF IN OPPOSITION TO PETITION TO TRANSFER

Thomas E. Hamer, #7408-48
2101 East 8th Street
Anderson, IN 46012
(765) 644-2831

David V. Dorris
Dorris Law Firm, P.C.
207 West Jefferson, Suite 601
Bloomington, IL 61701
(309) 820-9174

Patricia A. Small
William L. Broom III
Barrett, Twomey, Broom, Hughes & Wesley
100 North Illinois Avenue
Carbondale, IL 62902
(618) 457-0437

Attorneys for Plaintiffs,
Jerry Stanton and Ruth A. Stanton

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I. FULLY SUPPORTED BY THE EVIDENCE, THE VERDICT IS NOT EXCESSIVE

Given the staggering nature of the injuries Jerry Stanton suffered, the pain he endured and will continue to endure, and the devastating impact of those injuries on both his and his wife's lives, the jury's verdict was justifiably large. The trial judge, who heard the testimony and saw the witnesses, and the appellate judges, who meticulously reviewed the record, did not blush but, instead, concluded that the award is within the scope of the evidence.

A. The Court Of Appeals Was Not Obligated To Change The Law Of Indiana And Consider "Comparable" Cases In Reviewing This Verdict.

A jury determination of damages is entitled to great deference when challenged on appeal. *Sears Roebuck & Co. v. Manuilov*, 742 N.E.2d 453, 462 (Ind. 2001). In *Manuilov* this Court stated:

> Damages are particularly a jury determination. Appellate courts will not substitute their idea of a proper damage award for that of the jury. Instead, the court will look only to the evidence and inferences therefrom which support the jury's verdict. We will not deem a verdict to be the result of improper considerations unless it cannot be explained on any other reasonable ground. Thus, if there is any evidence in the record which supports the amount of the award, even if it is variable or conflicting, the award will not be disturbed.

Id. (quoting *Prange v. Martin*, 629 N.E.2d 915, 922 (Ind.Ct.App. 1994), *trans. denied* (citations omitted)).

To warrant reversal, the amount of damages must appear to be so outrageous as to impress the court at "first blush" with its enormity. *Kimberlin v. DeLong*, 637 N.E.2d 121, 129 (Ind. 1994), *cert. denied*, 516 U.S. 829 (1995). However, reversal is not justified if the amount of damages awarded is within the scope of the evidence before the court. *State v. Daley*, 153 Ind.App. 330, 287 N.E.2d 552, 556 (1972). Thus, the correct way to determine whether a verdict

is excessive is to first reconsider the evidence introduced at trial. *See State v. Thompson*, 179 Ind.App. 227, 385 N.E.2d 198, 214 (1979).

Kroger seeks to overturn the "first blush" test standard of review that Indiana courts have used for over 100 years. *See Louisville & N. R. Co. v. Kemper*, 153 Ind. 618, 53 N.E. 931, 936 (1899).[1] Borrowing a "comparability analysis" from other jurisdictions, Kroger would have Indiana courts determine whether a compensatory damages award is excessive by comparing it to awards in factually similar cases. Kroger's claim that Indiana courts have utilized a comparability analysis in both the punitive damages context and in evaluating emotional distress damages is unpersuasive.

The difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases was identified in *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539, 561-62 (Ind.Ct.App. 1999), *trans. denied, cert. denied*, 120 S.Ct. 1424 (2000), as one of three "guideposts" to determine whether a punitive damages award is grossly excessive. The comparison, however, is between the punitive damages award and the civil statutory or criminal penalties that could be imposed for comparable misconduct. *Id.* at 562. The punitive damage award is not compared to awards in factually similar cases.

In *Groves v. First Nat'l Bank of Valparaiso*, 518 N.E.2d 819 (Ind.Ct.App. 1988), *trans. denied*, the court considered cases from other jurisdictions to determine the extent of evidence required to support mental anguish damages. Based on an absence of evidence of any physical or psychological manifestation of mental anguish, the award was found to be excessive.

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[1] In *Kemper* this Court stated, "Unless the damages are so outrageous as to strike every one with the enormity and injustice of them, and to induce the court to believe that the jury must have acted from prejudice, partiality, or corruption, the court cannot, consistently with the precedents, interfere with the verdict." *Id.* This is the "first blush" test. *See Hines v. Nichols*, 76 Ind.App. 445, 130 N.E. 140, 142-43 (1921); *New York Cent. R.R. Co. v. Johnson*, 234 Ind. 457, 127 N.E.2d 603, 608 (1955).

However, one Indiana court looking to other cases for guidance in evaluating a particular type of damages is not sufficient to overturn Indiana's long history of evaluating compensatory damage awards on the basis of the unique facts of the case under review.

The thirteen page detailed recitation of pertinent evidence from the record is ample proof that the Court of Appeals ("the Court") conducted a meaningful review under the "first blush" test. Applying the correct standard of review, the Court concluded that it would not alter this award because it is not excessive.

B. Indiana Common Law, Not The 7th Amendment, Determines The Correct Method For Analyzing The Reasonableness Of This Verdict.

Kroger urged the Court to ignore Indiana common law and instead evaluate the reasonableness of the verdict using a comparability analysis. To determine the proper method of analysis, the Court reviewed the role of the jury in awarding compensatory damages. The decision not to utilize Kroger's proposed analysis was not based on a conclusion that the 7th Amendment constrains the ability to perform a post-verdict alteration of the award.[2] A review of Indiana caselaw led to the conclusion that Indiana courts have not adopted a comparability analysis for evaluating compensatory damage awards. (Opinion, p. 28, 31)

Indiana has a longstanding tradition of evaluating each case on its own unique facts:

> Each action is unique and must be so treated and determined on the facts peculiar to that matter. Because our law seeks to individualize the solution to the problem of properly compensating the victim of torts, no overall expedient applies in every case.
>
> * * *
>
> Appellant has documented numerous cases to show that the instant judgment far exceeds what as he says 'in Indiana or elsewhere' has been allowed for what he submits to be 'comparable injury'. We are not able to say the loss of an eye in one case is worth the same or just about the same in another case. If such a system is to be desired (and we express no sentiment for such idea) it must come

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[2] Article 1, § 20 of the Indiana Constitution guaranteeing that "[i]n all civil cases, the right to trial by jury shall remain inviolate," restrains appellate review of a verdict challenged as excessive. *See Carbone v. Schwarte*, 629 N.E.2d 1259, 1261 (Ind.Ct.App. 1994).

> from legislation. Our common law requires each case to rest finally on its own merits.

Kavanagh v. Butorac, 140 Ind.App. 139, 221 N.E.2d 824, 828 (1966)(footnote omitted).

Kroger faults the Court for referring to the 7th Amendment constraint on post-verdict alteration of a jury award because the 7th Amendment governs proceedings in federal court, not state court. Kroger then inconsistently also faults the Court for not engaging in a comparability analysis that has been found to be appropriate under the 7th Amendment. Federal courts, applying a federal standard for reviewing damage awards for excessiveness, may utilize a comparability analysis. *See Miksis v. Howard*, 106 F.3d 754, 764 (7th Cir. 1997). The Indiana Court of Appeals does not apply a federal standard of review and, therefore, its Opinion neither decides an important federal question in a way that conflicts with federal decisions nor significantly departs from 7th Amendment law.

C. The Court Of Appeals Correctly Determined That There Are No Cases Comparable To This One.

Prior to the accident Jerry was always hunting, fishing, working on cars, jogging, playing basketball and baseball, camping, and horseback riding. (R. 3005-08; 3014; 3022; 3047-48; 3051; 3085) Alfie and Jerry were "inseparable." (R. 3023) An affectionate, loving couple, they had "a very sexual relationship." (R. 3023; 3086)

On May 6, 1995, as a result of the tractor hitting him, Jerry suffered crush injuries to the pelvis, chest and abdomen and sustained fractured ribs and a lung contusion. (R. 3394-95)

Jerry endured multiple episodes of near-death resuscitation, over 50 surgeries, and 289 days of hospitalization. (R. 3073; 3029-31; 3322-24; 3464; 3563) During his treatment, a ventilator was required to breathe for him and dialysis was required when his kidneys shut down.

(R. 3396) Narcotic pain medication was administered throughout Jerry's hospitalization. (R. 2965; 2960-63)

Reconstructive surgery on his left hip was for naught because Jerry developed severe osteomyelitis (a bone infection) and a massive soft tissue infection. (R. 2967; 2990; 2972-74) Numerous surgeries were required to clear the soft tissue infection and to remove dead muscle, skin, subcutaneous fat, bone fragments and hardware placed in the initial surgery. (R. 2971; 2979; 2987) The osteomyelitis precludes surgery to fix the right side, which is at risk for developing posttraumatic arthritis. (R. 2990; 2979; 2986) Hip replacement is not an option because surgery might reactivate the osteomyelitis. (R. 2985)

Recurrences of infection in the pelvis in 1997 required additional surgeries to clean out the infection, remove more hardware, bone and soft tissue, and resulted in the head of the left femur being removed. (R. 3358, 3560; 3566) Jerry effectively lost the functional use of his legs to walk. (R. 3569)

The damage to Jerry's pelvis rendered him impotent and, despite a penile implant, sexual intercourse has not been possible. (R. 3493-94)

Jerry returns to bed several times a day because of pain. (R. 3014) Three to four times a week he takes Vicodin, a narcotic. (R. 3116)

This short summary of the uncontested evidence on damages, necessitated by length limitations, may erroneously make it appear that this case is indistinguishable from the cases cited by Kroger for comparison. It also illustrates the Court's concern about comparing damage awards to other cases due to the lack of a full explanation of the facts in reported personal injury cases. The Court correctly noted:

> [W]ithout a more thorough description of [Jerry's] injuries, the complications, the effects of the medical problems on his life, and the profound devastation the

> accident has caused him and his family, . . . it would be impossible for any other case to be compared accurately to this one.

(Opinion, p. 35 n. 8)[3] Reasoning that the search for similar cases is inherently flawed, the Court rejected Kroger's invitation to compare this case to others.

Kroger wants this Court to do what the trial court and Court of Appeals declined to do, substitute its judgment for that of the jury. The evidence in the record fully supports the amount of the award and, therefore, the award should not be disturbed. *Manuilov*, 742 N.E.2d at 462.

Kroger also wants this Court to compare this case to others and impose a judicial cap on the reasonable compensation to be awarded to the Stantons.[4] If such a system of comparison is desirable, it must come from legislation. *Kavanagh*, 221 N.E.2d at 828. This Court's rule dealing with the relief available on appeal for excessive damages[5] is not equivalent to the legislation contemplated in *Kavanagh* and does not deprive *Kavanagh* of vitality. A rule specifying the orders that may be entered if an award is excessive is not the same as a rule or statute requiring that the award under review be compared with factually similar cases in order to determine whether the award is excessive.

The Court found no indication that the jury acted out of prejudice, passion, or partiality.[6] Acknowledging that the amount of the award is sizeable, the Court nonetheless could not

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[3] See Appellees' Brief, pp. 22-29 and Opinion, pp. 36-48 for more detailed recitations of the evidence.

[4] It is recommended that there be no ceilings on pain and suffering damages. American Bar Assoc., *Report of the Action Commission to Improve the Tort Liability System*, 13 (1987).

[5] Ind. Appellate Rule 66(C)(4) and (5), replacing App. R. 15(N)(5).

[6] The suggestion that the Stantons' counsels' closing argument inflamed passion against Kroger and inferred that Kroger should be punished was rejected. (Opinion, pp. 48-51) The jury attributing 20% of the fault to Jerry is credible evidence of the jury's objectivity.

conclude that it is outrageous given the evidence. Neither a new trial nor a new trial subject to remittitur is warranted.

II. THE AWARD DOES NOT VIOLATE DUE PROCESS OR DUE COURSE OF LAW.

Kroger contends that if review demonstrates that a defendant "did not receive adequate notice of the magnitude of the sanction," due process indicates that the verdict is excessive. Kroger's contention is unsupported by *Ammerman*, the authority cited.

The *Ammerman* Court's due process analysis was based upon *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), which reaffirms that grossly excessive punitive damages awards -- awards that exceed the amount necessary to vindicate the State's legitimate interest in punishment and deterrence -- violate the due process clause. However, this case involves compensatory damages, not punitive damages. Unlike punitive damages, compensatory damages are not awarded to deter wrongful conduct. Compare *Watson v. Thibodeau*, 559 N.E.2d 1205, 1209 (Ind.Ct.App. 1990)("The purpose of compensatory damages is to award or impose a pecuniary compensation, recompense or satisfaction for an injury done or a wrong sustained by a party.") with *Orkin Exterminating Co., Inc. v. Traina*, 486 N.E.2d 1019, 1022 (Ind. 1986)("Punitive damages are not compensatory in nature but are designed to punish the wrongdoer and to dissuade him and others from similar conduct in the future.")

Kroger cites no authority supporting its claim that due process requires fair notice of the amount of compensatory damages that can be awarded. Indiana's judicial tradition provided Kroger with fair notice that if the jury found it liable for the accident, the Stantons were entitled to be fairly compensated to the full extent of the injuries suffered. *See Kavanagh*, 221 N.E.2d at 828.

According to Kroger, if this general damages award is the new benchmark for general damages, "then even responsible individuals and corporations are grossly underinsured because present coverages are predicated on general damage awards substantially lower than awarded in this case." (Pet., p. 10) First, it is significant that Kroger does not claim to have insufficient insurance coverage to satisfy the damages award in full. Second, no authority is cited to support Kroger's assertion that present coverages are predicated on general damage awards. This Court in *Hanson v. St. Luke's United Methodist Church*, 704 N.E.2d 1020 (Ind. 1998), did not express concern regarding the level of insurance coverage available to satisfy a damage award.

Because the award is within the scope of the evidence, there is no merit to Kroger's constitutional claims. Kroger's complaint that the Court did not address longstanding rules giving courts authority to remit excessive damages is likewise without merit. Although a jury's discretion in determining damages "is not limitless," *Dollar Inn, Inc. v. Slone*, 695 N.E.2d 185, 190 (Ind.Ct.App. 1998), *trans. denied*, the authority to reduce excessive verdicts is not implicated when the reviewing court finds, as the Court did herein, that the verdict is not excessive. *See, e.g., Kavanagh*, 221 N.E.2d at 829. There is no basis for remitting the award or granting a new trial.

III. THE COURT OF APPEALS CORRECTLY APPLIED RULING PRECEDENT TO DECIDE THAT THE STANTONS' CLAIMS ARE NOT BARRED BY THE EXCLUSIVITY PROVISION OF THE WORKER'S COMPENSATION ACT.

The burden of proving that the Stantons' claims fall within the scope of the Worker's Compensation Act ("the Act") is borne by Kroger as the party challenging the trial court's jurisdiction. *GKN Co. v. Magness*, 2001 WL 244110 at *4-5 (Ind. 2001). The *de novo* standard of review is applicable because the facts before the trial court were disputed and the court ruled

on a paper record. *Id.* at *3. However, the trial court's ruling on Kroger's motion to dismiss for lack of subject matter jurisdiction is presumed to be correct. *Id.*

A. Kroger And Gateway Did Not Constitute A Single Employer Under The Act.

Attempting to defensively pierce the very corporate veil that it alone erected, Kroger contends that the Stantons' claims are barred by the exclusive remedy provision because Kroger and Gateway constituted a single employer. Perceiving little likelihood that equity will ever require it to pierce the corporate veil to protect the same party that erected it, this Court in *McQuade v. Draw Tite, Inc.*, 659 N.E.2d 1016 (Ind. 1995), rejected a similar attempt by a corporate parent to disregard the corporate form to avoid liability. To evade the "separate corporate entity" rule of *McQuade*, Kroger asserts that footnote 4 creates an exception that is applicable when the parent corporation trying to pierce the corporate veil relies on both its interconnectedness with the subsidiary and an express or implied employment contract with the plaintiff. According to Kroger, this case falls within the "exception" to *McQuade* due to the "substantial interconnectedness" with Gateway[7] and a contract of employment with Stanton[8] in the form of a collective bargaining agreement.

Kroger is mistaken in its assertion that "[t]he Opinion concluded that a collective bargaining agreement is not always an express or 'direct' employment contract, because such contracts are often at-will." (Pet., pp. 11-12) The Court stated that *Bentz Metal Prod. Co. v. Stephans*, 657 N.E.2d 1245 (Ind.Ct.App. 1995), "holds that the existence of a collective bargaining agreement does not preclude the existence of an employment at-will relationship

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[7] See Appellees' Brief at pp. 1-2 for facts demonstrating separateness between Kroger and Gateway.

[8] Specifically characterizing it as an *express* contract of employment no less than five times (Appellants' Reply Br., pp. 7-8, 12, and 18), Kroger did not raise the question of an implied employment contract in the Court of Appeals.

between the employer and the employee." (Opinion, p. 18) The Court concluded that *Bentz* "does not stand for the definitive proposition that a collective bargaining agreement *creates* an employment *contract*." (*Id.*)

Kroger contends, based on provisions of the Master Agreement, that "Stanton was not employed at will, but rather could only be discharged for cause." (Pet., p. 12) This contention ignores the statement of the *Bentz* Court that "[e]mployment security provisions in collective bargaining agreements under which the 'employee can no longer be terminated at the whim of the employer,' . . . do not necessarily conflict with the employment at-will doctrine." *Bentz*, 657 N.E.2d at 1249-50.

Kroger cites no authority that supports its contention that the collective bargaining agreement was an employment contract with Stanton. Although a collective bargaining agreement can be considered a contract relating to employment, it is generally not considered to be a contract of employment. *See, e.g., J.I. Case Co. v. Nat'l Labor Rel. Bd.*, 321 U.S. 332, 334-35, 64 S.Ct. 576, 579 (1944)("The negotiations between union and management result in what often has been called a trade agreement, rather than a contract of employment."); *Young v. North Drury Lane Prod., Inc.*, 80 F.3d 203, 206 (7th Cir. 1996)("[A] labor agreement is not a contract of employment."); *In re Continental Airlines Corp.*, 901 F.2d 1259, 1264 (5th Cir. 1990, *cert. denied,* 506 U.S. 828 (1992)("Unlike a contract of employment, ordinarily a collective bargaining agreement does not create an employer-employee relationship . . . . It neither obligates any employee to perform work nor requires the employer to provide work.")

The Court concluded that if any exception is suggested by the "express or implied employment contract" language of the *McQuade* footnote, it would be limited to cases where there is a direct employment contract with the parent corporation, not a collective bargaining

agreement that includes the parent corporation along with other employers. (Opinion, p. 21) Even indulging Kroger's claim that the footnote creates an exception, the Court correctly applied ruling precedent and properly found that there was not a sufficient contractual relationship between Kroger and Stanton to fall within the exception and take this case outside the scope of the *McQuade* holding. (Opinion, pp. 16-23) The Court's decision neither erroneously decides a new question of law nor contravenes ruling precedent.

B. The Opinion Does Not Contravene This Court's Decision In *Degussa*.

Kroger's argument on the borrowed servant issue is merely a re-packaged reiteration of the argument that Kroger and Gateway were so highly integrated that they constituted a single employer. Indeed, Kroger stated, "Much of the evidence which supports the conclusion that Kroger and Gateway are essentially a single entity also supports the conclusion that if Gateway and Kroger are considered separate, Stanton was Kroger's borrowed servant at the time of the accident." (Appellants' Br., pp. 19-20) Although Kroger improperly focuses on its relationship with Gateway, the Court considered the facts that Kroger identifies in the Petition as supporting its assertion that application of the *Hale*[9] factors in this case compels a finding of dual employment.

Kroger claims a right to indirectly discipline Gateway employees. (See Opinion, pp. 11-12) The first *Hale* factor is right to discharge, not right to discipline. *Hale*, 579 N.E.2d at 67. Kroger presented no evidence that it had the power to indirectly discharge Stanton by instructing Gateway that it no longer wanted him to deliver Kroger loads. *See GKN Co.*, 2001 WL 244110 at *5. Gateway alone controlled the hiring, discipline, and discharge of its drivers. (R. 834, 1321-22, 1500-01, 1510)

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[9] *Hale v. Kemp*, 579 N.E.2d 63, 67 (Ind. 1991).

Kroger's provision of the working capital to fund Gateway's operating budget is an aspect of their interconnectedness, not a factor weighing in favor of a conclusion that Stanton was an employee of Kroger. (See Opinion, p. 12) Stanton was paid by Gateway with a Gateway check. (R. 1313-14) Operated under a zero-based budget, on a daily basis all cash *in excess* of Gateway's operating needs is wire transferred for deposit into Kroger's operating account for investment. (R. 770; 1317) Kroger does not claim that Gateway operated at a loss and, therefore, it is reasonable to conclude that at least a portion of Gateway's gross receipts were returned to Gateway to meet its payroll.

The tractors and trailers Kroger supplies to Gateway bear Gateway's logo, are titled in the State of Illinois in the name of Gateway, and carry an Illinois license plate obtained in Gateway's name. (R. 1374; 1378-80) If Kroger employees worked on a Gateway truck, Kroger billed Gateway for the labor time of the Kroger employees and for any parts used. (R. 1318-19; 1354)(See Opinion, pp. 12-13)

Although Kroger claims it prepared the delivery schedule for Gateway drivers, Stanton bid the runs he was to make; he was not assigned by Kroger to make specific deliveries. (R. 834; see Opinion p. 13) Stanton was solely and exclusively under the control of Gateway and received all daily supervision and instructions from Gateway supervisory personnel. (*Id.*) A Gateway dispatcher at Gateway's East Peoria facility gave Stanton written instructions as to which Gateway tractor and Gateway trailer he was to use. (R. 835) Although generally the route a Gateway driver was to follow was determined by Gateway, no route was specified for Stanton the day of the accident. (R. 835; 1328) Nor was Stanton given a time schedule. (R. 835)

Kroger's contention that Stanton was its employee because he received Kroger benefits is covered by the Court's consideration of Stanton's participation in the Kroger 401k plan ("K-

Plan"). (Opinion, pp. 21-22) Additionally, Kroger's collective bargaining agreement with the Teamsters was thoroughly discussed by the Court. (Opinion, pp. 16-21)

The Court also discussed the contract between Kroger and Gateway, identifying several clauses contradicting Kroger's assertion that it perceived Gateway drivers to be Kroger employees. (Opinion, pp. 9-10) Under the contract, Gateway was a "bailee only" and title to all product delivered for Kroger remained in Kroger. (R. 932) Each company agreed to hold the other harmless and indemnify the other from all claims, suits, and judgments for damages caused by the act or omission of its agent or employee. (*Id.*) Gateway had to furnish evidence of coverage under Illinois' worker's compensation laws. Kroger was required to pay Gateway for each case of product it delivered and for transportation charges according to the published tariff. Gateway would deliver store mail to Kroger stores for a per-delivery fee. The Court correctly noted, "These contract provisions are not the type one would typically expect Kroger to have in an agreement with its own employees." (Opinion, p. 10)

Under the *GKN* test, there was no dual employment. Additionally, the Opinion does not contravene this Court's decision in *Degussa Corp. v. Mullens*, 2001 WL 267766 (Ind. 2001). There is no indication on the face of the *Degussa* opinion that a parent-subsidiary relationship was involved in that case as Kroger claims.[10] Nevertheless, the Court considered Kroger's borrowed servant argument, albeit not in a direct analysis of the *Hale* factors. Kroger simply failed to persuade the Court that the balance of evidence is tipped against the trial court's findings[11] relating to Kroger's relationship with Stanton.

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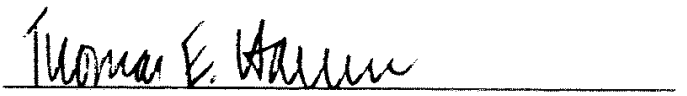
[10] There appears to be no parent-subsidiary relationship between Agritek, the corporation claiming to be the plaintiff's employer, and Grow Mix, the plaintiff's employer. Under the contract between them, Grow Mix was a subcontractor of Agritek. *Id.* at *5-6.

[11] The Court noted that "[t]he trial court necessarily made factual determinations in reaching its conclusion that Stanton's claim was not barred by the Act, even though it did not issue written findings detailing those specific determinations." (Opinion, p. 6)

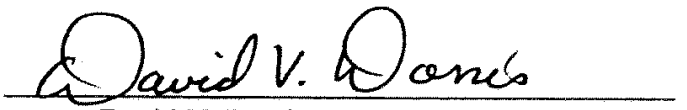
CONCLUSION

For the foregoing reasons, the Stantons request that this Court deny Defendants' Petition to Transfer.

Respectfully submitted,

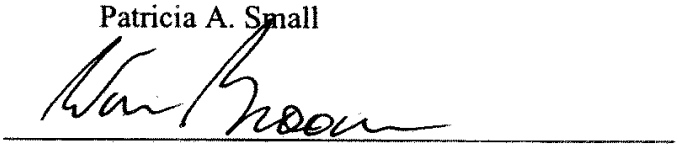


Thomas E. Hamer



David V. Dorris

Patricia A. Small



William L. Broom III

Attorneys for Plaintiffs,
Jerry Stanton and Ruth A. Stanton

Thomas E. Hamer
2101 East 8th Street
Anderson, IN 46012
(765) 644-2831

David V. Dorris
DORRIS LAW FIRM
P.O. Box 1232
Bloomington, IL 61701
(309) 820-9174

Patricia A. Small
William L. Broom III
BARRETT, TWOMEY, BROOM, HUGHES & WESLEY
100 North Illinois Avenue
P.O. Box 3747
Carbondale, IL 62902-3747
Tel. (618) 457-0437